FILED
95 1114 JAN 9 - 1996
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

J.S.G. BOGGS,

Petitioner,

vs.

ELJAY BOWRON, ROBERT RUBIN, and JANET RENO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KENT A. YALOWITZ
Counsel of Record
BRUCE R. KELLY
MARLA EISLAND
399 Park Avenue
New York, New York 10022
(212) 715-1000

DENNIS G. LYONS
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Attorneys for Petitioner,
J.S.G. Boggs

Of Counsel:
ARNOLD & PORTER
Washington, D.C., and
New York, New York

January 1996

88 pp

QUESTIONS PRESENTED

1. Whether a conviction may be obtained under 18 U.S.C. § 474 against an artist whose work includes likenesses in various degrees of resemblance to United States currency where the artist has no intent to defraud, in light of the principles that (a) *scienter* is a necessary element for conviction of any felony where First Amendment rights are implicated and (b) a statute must be interpreted to avoid serious First Amendment concerns.

2. If the answer to question 1 is "yes," whether 18 U.S.C. §§ 474 and 504 unconstitutionally restrict rights of free expression secured by the First Amendment.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . (i)

TABLE OF CONTENTS . . . . . (ii)

TABLE OF AUTHORITIES iv

OPINIONS OF OTHER COURTS 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED . . 2

STATEMENT 4

THE ARTIST 4

CENSORED AND HARASSED BY FEDERAL AGENTS 5

THE DISTRICT COURT DECISION 7

THE COURT OF APPEALS DECISION 8

REASONS FOR GRANTING THE WRIT 9

I. THE OPINIONS BELOW PLACE MILLIONS IN VIOLATION OF A FELONY STATUTE 10

II. THE OPINIONS BELOW IGNORE FUNDAMENTAL RULES OF STATUTORY INTERPRETATION 12

III. THIS COURT'S ATTENTION TO 18 U.S.C. § 504 IS WARRANTED 15

IV. THE D.C. CIRCUIT'S INTERPRETATION OF § 474 CONFLICTS WITH THAT OF OTHER CIRCUITS 19

CONCLUSION 22

TABLE OF CONTENTS—Continued

Page

APPENDIX 1a

A. COURT OF APPEALS OPINION 1a

B. DISTRICT COURT OPINION 3a

C. DISTRICT COURT ORDER OF DECEMBER 9, 1993 . . 47a

D. DISTRICT COURT ORDER OF MARCH 27, 1995 . . . . 49a

E. SURVEY OF MAGAZINES NOT SATISFYING SIZE AND COLOR RESTRICTIONS OF 18 U.S.C. § 504 (FROM BRIEF FOR APPELLANT) 51a

F. EXAMPLE OF BOGGS WORK OF ART (FROM PLAINTIFF'S SUMMARY JUDGMENT EX. 1) 56a

TABLE OF AUTHORITIES

Cases: Page

Britt v. *United States*, 391 F.2d 540 (5th Cir. 1968) 19
Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 14
Doe v. *Bolton*, 410 U.S. 179 (1973) 8
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 12,14
Frisby v. *Schultz*, 487 U.S. 474 (1988) 14
Ex parte Holcomb, 12 F. Cas. 328 (C.C.D. Minn. 1871) 19
Hustler Magazine v. *Falwell*, 485 U.S. 46 (1988) 11
Koran v. *United States*, 408 F.2d 1321 (5th Cir. 1969) 19
Liparota v. *United States*, 471 U.S. 419 (1985) 11,12
Litofsky v. *United States*, 9 F.2d 877 (2d Cir. 1925) 20
Michener v. *United States*, 157 F.2d 616 (8th Cir. 1946), 331 U.S. 789 (1947) 19
Morissette v. *United States*, 342 U.S. 246 (1952) . . . 8,9,12,13
New York v. *Ferber*, 458 U.S. 747 (1982) 11
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 11
Pawley v. *United States*, 73 F.2d 907 (9th Cir. 1934) 20
Public Citizen v. *Department of Justice*, 491 U.S. 440 (1989) 14
Regan v. *Time, Inc.*, 468 U.S. 641 (1984) 8,15,17
Simon & Schuster, Inc. v. *New York State Crime Victims Bd.*, 502 U.S. 105 (1991) 16,18
Smith v. *California*, 361 U.S. 147 (1959) 8,11
Staples v. *United States*, 114 S. Ct. 1793, (1994) 13
Staton v. *United States*, 88 F. 253 (8th Cir. 1898) 20
Steffel v. *Thompson*, 415 U.S. 452 (1974) 8
United States v. *Balint*, 258 U.S. 250 (1922) 13

TABLE OF AUTHORITIES—Continued

Page

United States v. *Bates*, 468 F.2d 1252 (5th Cir. 1972) 20
United States v. *Fitzgerald*, 91 F. 374 (N.D. Wash. 1898) 20
United States v. *Green*, 962 F.2d 938 (9th Cir. 1992) 19,20
United States v. *Hester*, 598 F.2d 247 (D.C. Cir. 1979) 20
United States v. *Kenney*, 5 F.3d 214 (7th Cir. 1993) 20
United States v. *Massey*, 629 F.2d 1084 (5th Cir. Unit A 1980), *cert. denied*, 450 U.S. 969 (1981) 20
United States v. *NTEU*, 115 S. Ct. 1003 (1995) 18
United States v. *Parr*, 716 F.2d 796 (11th Cir. 1983) 19
United States v. *Price*, 795 F.2d 61 (10th Cir. 1986) 20
United States v. *Raynor*, 302 U.S. 540 (1938) 5
United States v. *Sonnenberg*, 158 F.2d 911 (3d Cir. 1946) 20
United States v. *Sullivan*, 406 F.2d 180 (2d Cir. 1969) 20
United States v. *Turner*, 586 F.2d 395 (5th Cir. 1978) 20
United States v. *Weber*, 210 F. 973 (D. Wash. 1913) 20
United States v. *White*, 611 F.2d 531 (5th Cir.), *cert. denied*, 446 U.S. 992 (1980) 19-20
United States v. *White*, 27 F. 200 (C.C.E.D. Mo. 1886) 19
United States v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) 9,11,12,14
Village of Schaumberg v. *Citizens for a Better Env't*, 444 U.S. 620 (1980) 18
Wagner v. *Simon*, 412 F. Supp. 426 (W.D. Mo. 1975) 19

TABLE OF AUTHORITIES—Continued

Page

Webb v. *United States*, 216 F.2d 151 (6th Cir. 1954) 19

Constitutional, Statutory and Regulatory Provisions:

U.S. Const. Art. III 7
U.S. Const. Amend. I. . . . . *passim*
18 U.S.C. § 471 9,21
18 U.S.C. § 47[illegible] 9,21
18 U.S.C. § 474 . . . . . *passim*
18 U.S.C. § 481 19
18 U.S.C. § 495 20
18 U.S.C. § 504 . . . . . *passim*
18 U.S.C. § 3282 10
28 U.S.C. § 1254 1
Ch. 33, 37th Cong., 2d Sess., 12 Stat. 345 (Feb. 25, 1862) 13
Ch. 73, 37th Cong., 3d Sess., 12 Stat. 709 (March 3, 1863) 14
Pub. L. 102-550, Title XV, 106 Stat. 3672 (1992), codified at 18 U.S.C. § 504(1)(D) & (2) 18-19
S. Ct. R. 29 1

Legislative and Administrative Materials:

Letter from S.P. Chase to Thaddeus Stevens (Feb. 3, 1862) 13
Letter from Lot M. Morrill to John Sherman (Jan. 15, 1877) (*printed in* Ex. Doc. No. 19, 44th Cong., 2d Sess. (Jan. 17, 1877)) 14
Redesign of the Currency: Hearing Before the House Comm. on Banking, 103d Cong., 2d Sess. (July 13, 1994) 17
John Sherman, *Recollections of Forty Years in the House, Senate and Cabinet* (1895) 13

TABLE OF AUTHORITIES—Continued

Page

Letter from John Sherman to W.A. Wheeler (Jan. 16, 1978) (*printed in* Ex. Doc. No. 10, 45th Cong., 2d Sess. (Jan. 17, 1878)) 14
Elbridge G. Spaulding, *History of the Legal Tender Paper Money Issued During the Great Rebellion* (1869) 13
Letter from George F. Talbot to Lot M. Morrill (Jan. 15, 1877) (*printed in* Ex. Doc. No. 19, 44th Cong., 2d Sess. (Jan. 17, 1877)) 14
U.S. Mint Authorization, The Bureau of Engraving & Printing & the U.S. Secret Service Counterfeit Division: Hearing Before the Subcomm. on Consumer Affairs & Coinage of the House Comm. on Banking, Finance & Urban Affairs, 102d Cong., 1st Sess. (Apr. 23, 1991) 17-18
U.S. Secret Service, Proposed Rule, *Color Illustrations of U.S. Currency*, 60 Fed. Reg. 32929 (June 26, 1995) 19

Journalists' Reports:

Charles R.T. Crumpley, "A New Look for Ben and Other Bills to Foil Counterfeiters," *Kansas City Star*, Sept. 28, 1995, p. A1 16
Robert E. Schafrik & Sara E. Church, "Protecting the Greenback," *Scientific American*, July 1995, p. 40 18
John Schmeltzer, "We're In the Money; U.S. Launches Plan to Sell New $100 Bill," *Chicago Tribune*, Sept. 28, 1995, p. 1 16
Ralph Varabedian, "Uneasy Money; U.S. Unveils $100 Note in Bid to Thwart Counterfeiters," *Los Angeles Times*, Sept. 28, 1995, p. D1 16
"$100 Bill is Getting a Face Lift to Foil Cheats," *Greensboro News & Record*, Sept. 28, 1995, p. A1 16

TABLE OF AUTHORITIES—Continued

Page

"$100 Bill's Face Lift Shown Off," *Houston Chronicle*, Sept. 28, 1995, p. 1 16
"A More Current Currency," *Baltimore Sun*, Sept. 28, 1995, p. 1A 16
"Ben's $100 Bill Gets a Makeover," *Cincinnati Post*, Sept. 28, 1995, p. 1A 16
"Bigger Ben for $100 Bills," *Arizona Republic*, Sept. 28, 1995, p. A1 16
"Cashing In: $100 Bill Remade," *St. Louis Post-Dispatch*, Sept. 28, 1995, p. 1A 16
Color Photo, *USA Today*, Sept. 28, 1995, p. 1A 16
"Countering Counterfeiters," *Louisville (KY) Courier Journal*, Sept. 28, 1995, p. 17 17
"Hot Off the Press; Left-Of-Center Franklin May Thwart Counterfeiters," *New Orleans Times-Picayune*, Sept. 28, 1995, p. C1 17
"New $100 Bill Intended to Flatter Franklin, Foil Fakers," *Atlanta Journal & Constitution*, Sept. 28, 1995, p. E1 17

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. ·

J.S.G. BOGGS,

Petitioner,

v.

ELJAY BOWRON,
ROBERT RUBIN, AND JANET RENO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

J.S.G. Boggs, by his undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

OPINIONS OF OTHER COURTS

The unpublished opinion of the court of appeals (App. 1a-3a) is reported at 67 F.3d 972 (table). The opinion of the District Court (App. 4a-46a) is reported at 842 F. Supp. 542.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1995 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

---

[1]This petition is not filed on behalf of any corporation. *See* S. Ct. R. 29.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

2. 18 U.S.C. § 474(a) (Supp. V 1993) provides in part:

> **§ 474. Plates or stones for counterfeiting obligations or securities**
>
> (a) * * * *
>
> [5] Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or
>
> [6] Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States—
>
> Is guilty of a class C felony.

3. 18 U.S.C. § 504 (Supp. V 1993) provides in part:

> **§ 504. Printing and filming of United States and foreign obligations and securities**

Notwithstanding any other provision of this chapter, the following are permitted:

(1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—

(A) postage stamps of the United States,

(B) revenue stamps of the United States,

(C) any other obligation or other security of the United States, and

(D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation.

Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—

(i) all illustrations shall be in black and white . . . ;

(ii) all illustrations . . . shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph . . .; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

The Secretary of the Treasury shall prescribe regulations to permit color illustrations of such currency of the United States as the Secretary

determines may be appropriate for such purposes.

* * * *

STATEMENT[2]

The Artist. J.S.G. Boggs is an internationally recognized artist whose work is in the permanent collections of the Smithsonian Institute, the British Museum, and the Art Institute of Chicago. He is represented by the Nancy Drysdale Gallery in Washington, D.C. Boggs received formal training in fine arts at Columbia University and holds a lifetime appointment at Carnegie Mellon University's Center for the Advancement of Applied Ethics. *See* App. 5a-6a & nn.5-6; Boggs Aff. ¶ 1-2; Mayer Decl. ¶ 4.

Boggs' hallmark is the use of images of money in his work, which offers a commentary on social, political, and philosophical issues and is rooted in a strong historical tradition. Chambers Decl. ¶¶ 5-12; Mayer Decl. ¶¶ 5-6. An example of his work from the record is reproduced, in actual size, at App. 56a.

Like many modern artists, Boggs has struggled to make his work accessible to ordinary people. To bring his work out of the museums and galleries and into the street, he engages in transactions using his art as a medium of barter. In proposing a transaction, Boggs offers to exchange a work of art, sometimes the same size as currency but generally one-sided, for goods or services. The proposal is designed to elicit a dialogue about the meaning and use of art and money in everyday life. The viewer grapples with questions about what art should look like, what should be done with it, what it represents, why we value money, and why we value art. Sometimes the art is accepted in exchange for goods or

---

[2]Because this case is before the Court on a grant of summary judgment against Petitioner, this statement is drawn from the affidavits and other evidence in the record, drawing all reasonable inferences in favor of Petitioner.

services, sometimes not. App. 6a-7a & nn.8-10; Boggs Aff. ¶¶ 6-8; Mayer Decl. ¶¶ 6-7.

Boggs does not defraud anyone. People who accept his work do so with full knowledge that it is not genuine currency—and not only because of Boggs' representations. Boggs' work has never been—and cannot be—"passed off" as genuine to a person of ordinary observation. *See* App. 56a. Indeed, over the years, Boggs has created and bartered thousands of works of art around the world. There is no evidence in the record of a single person who has complained to any law-enforcement authority about being defrauded by Boggs or anyone else using his art. In the District Court, we repeatedly challenged Respondents to produce such evidence. They could not. App. 6a-7a, 35a & n.35.

Censored and Harassed By Federal Agents. Agents of the Secret Service—the federal agency charged with enforcing the anti-counterfeiting statutes—have repeatedly harassed Boggs, apparently because they do not like the subject matter of his work. While many publishers and advertisers large and small use images of money, the Secret Service has singled out Boggs, repeatedly censoring him, confiscating his art, and threatening to imprison him.

Because Boggs has no intent to defraud—indeed he is extremely careful to avoid creating art that could be used to defraud—the Government has never invoked the statutes that prohibit counterfeiting *per se*, for they expressly require an "intent to defraud." Instead, the Secret Service has attempted to invoke two clauses of 18 U.S.C. § 474, a statute originally enacted in 1862 "to prevent and punish counterfeiting" by proscribing "the possession of, or trafficking in, counterfeit obligations or the materials and devices used to make such obligations." *See United States* v. *Raynor*, 302 U.S. 540, 548 (1938). Those two clauses do not expressly contain an intent-to-defraud element and have therefore been interpreted as strict-liability prohibitions by the Secret Service. The Secret Service further claims that section 474 may be invoked against Boggs because his work does not fall within the safe harbor of 18 U.S.C. § 504 for an "illustration" of money that meets certain size and color limitations, that is, that it

be smaller than 75% or greater than 150% of actual size *and* in black and white.

In September 1990, Secret Service agents in Florida censored a catalog entitled *smart money (HARD CURRENCY)*, which was to accompany an exhibition of Boggs' work. Boggs originally designed the catalog to present reproductions of his work in its actual dimensions and colors. Secret Service agents told the printer that he had violated the counterfeiting laws by creating color separations for the catalog and that printing the catalog as designed would be a further crime. Naturally, the printer refused to print the catalog in the face of this "advice." With the exhibition scheduled to begin shortly, Boggs was forced to redesign the content of the catalog to comport with the Secret Service's views of what did or did not violate 18 U.S.C. § 474 and its companion, 18 U.S.C. § 504. The United States Attorney declined prosecution. App. 7a; Verified Complaint ¶¶ 9-10; Boggs Decl. ¶ 2; Bittman Decl. ¶¶ 5-7.

In March 1991, while Boggs was in Cheyenne, Wyoming for the opening in that city of the *smart money (HARD CURRENCY)* exhibition, a Secret Service agent and the United States Attorney for the District of Wyoming appeared at Boggs' hotel-room door and demanded that Boggs hand over his entire inventory of art. The United States Attorney himself presided over a warrantless seizure of Boggs' First Amendment materials, while the Secret Service agent repeatedly threatened to arrest Boggs. After several hours of tense negotiation, the United States Attorney agreed to take only fifteen specimens and told Boggs that they would be sent to Washington, D.C., for a "determination" of whether the work was "contraband." Despite repeated demands, the Secret Service has flouted well-established constitutional law for years, refusing to return the art or seek a hearing approving its seizure. Again, the United States Attorney declined prosecution. App. 7a-8a; Verified Complaint ¶¶ 11-12; Boggs Decl. ¶ 3.

Then, in December 1992, Secret Service agents in Pennsylvania seized more than 1300 items of personal property including dozens of drawings from Boggs' home and faculty office. They destroyed valuable pieces of art during their search. They

"accidentally" smashed Boggs' eyeglasses by picking them up, dropping them on the floor, and stepping on them. Once again, the United States Attorney declined prosecution. App. 8a; Verified Complaint ¶ 13; Boggs Decl. ¶¶ 4-6.

Respondents have thus refused to present any case against Boggs to a judge and jury, preferring instead to rely exclusively on their persistent course of extrajudicial threats and *ex parte* seizures. Indeed, the United States Attorney in Washington, D.C., has stated in writing that Respondents do not intend even to file a civil forfeiture action, "but will merely keep" Boggs' art as "contraband."

The District Court Decision. On September 3, 1993, Boggs commenced this action in the United States District Court for the District of Columbia, invoking the court's federal-question jurisdiction and seeking declaratory and injunctive relief against the Director of the Secret Service, the Secretary of the Treasury, and the Attorney General in their official capacities. Boggs sought injunctive relief not only against potential prosecution, but also against further harassment by the Secret Service.

On December 9, 1993, the District Court granted Defendants' motion for summary judgment, dismissed the Complaint's First Claim (for declaratory and injunctive relief), and denied Boggs' motion for a preliminary injunction as "moot."[3] The basis of this mootness ruling was merely that the claim had been dismissed on the merits—not that anything had rendered the case moot in the traditional Article III sense. Indeed, the District Court found that Boggs has a well-founded fear of prosecution and that he

> is being injured by the Secret Service in a number of ways other than threat of prosecution. Not only has the Secret Service seized his work, but also Mr. Boggs finds himself unable to sell his art. Fear of Secret

---

[3]The District Court has held the Complaint's Second Claim (for return of property and money damages) in abeyance pending appellate review. App. 50a.

> Service seizure has also caused the artists' cooperative where Boggs lives to stop accepting his work. Boggs Aff. ¶ 15. Collectors and gallery owners who would like to show or buy Boggs' work are also fearful of Secret Service intervention. *See* Sam Berkovitz Aff.

App. 15a. Because of these injuries, the District Court determined that the case was fully appropriate for a decision on the merits and rejected the Government's contention that the court was powerless to act, holding that Boggs "'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief'" to protect his First Amendment rights. App. 12a (quoting *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973), and citing *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974)).

The District Court also found that "[n]o one seriously suggests that Mr. Boggs has any intent to defraud," so that "if intent to defraud is statutorily required, no jury could find that the statute applies to Boggs." App. 35a. But the District Court held that "[i]f Congress intended an intent to defraud or an intent to pass as genuine standard it would have said so explicitly." App. 38a (internal quotations and emphasis omitted). In holding that section 474 is a strict-liability felony, the District Court did not point to any "affirmative instruction" by Congress to this effect, as is required by *Morissette* v. *United States*, 342 U.S. 246, 273 (1952), and did not acknowledge two important principles of statutory interpretation: that the First Amendment forbids strict-liability crimes infringing on speech, *e.g.*, *Smith* v. *California*, 361 U.S. 147 (1959); and that, where possible, statutes must be construed to avoid deciding constitutional questions. Instead, the District Court conducted a time-place-and-manner constitutional analysis of the size and color limitations set out in 18 U.S.C. § 504 and upheld their facial validity under the analysis in Justice Stevens' concurring opinion in *Regan* v. *Time, Inc.*, 468 U.S. 641, 704 (1984). App. 32a.

The Court of Appeals Decision. On appeal, the Government acknowledged that if the statute were interpreted as defining a strict-liability felony it would violate the First Amendment. It therefore conceded that "these are not strict liability provisions."

Brief for Appellees 38. Nonetheless, the Court of Appeals affirmed in an unsigned opinion, "substantially for the reasons" stated by the District Court, App. 2a, thereby embracing the District Court's determination that 18 U.S.C. § 474 defines a strict-liability felony. The Court of Appeals explained this holding with the one-line assertion that "[c]onstruing the statutes as Boggs suggests would render them duplicative of §§ 471 and 472 and is required neither by *Morissette* v. *United States*, 342 U.S. 246 (1952), nor by *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994)." App. 2a. The court did not deal with the cases that have held that intent to defraud is a required element for conviction under 18 U.S.C. § 474 and similar statutes. It did not deal with the legislative history of the statute, which was presented to it in detail. It did not deal with the doctrine of avoiding constitutional questions. And it did not deal with the significant technological advances that have rendered the contours of 18 U.S.C. § 504 obsolete. Indeed, it did not elaborate at all on the District Court's analysis of section 504. On all of these issues, it was silent.

REASONS FOR GRANTING THE WRIT

In this civil action for declaratory and injunctive relief against prosecution and harassment, both courts below reached the merits after deciding that the case was properly presented as a procedural matter. Thus, they were of the view that if the statutes invoked by the Government do not cover Boggs, he would be entitled to the relief requested, notwithstanding the procedural objection made by the Government that Boggs should be required to await prosecution (where the Government had elected to proceed through harassment rather than by criminal indictment) or to await a forfeiture action (where the Government had elected to proceed through confiscation rather than by civil complaint). Both courts recognized that this procedural objection was meritless. As the District Court explained,

> Actions for declaratory relief against criminal prosecution have become a common method of challenging the constitutionality of federal statutes. Moreover, courts

> have not hesitated to restrain or enjoin criminal prosecution where First Amendment rights are at stake.

App. 12a. Thus, the only issues presented by this Petition involve whether the statutes mean what the lower courts said they mean and, if so, whether they are consistent with the First Amendment.

I. THE OPINIONS BELOW PLACE MILLIONS IN VIOLATION OF A FELONY STATUTE

Under the lower courts' opinions, a strict-liability felony is being committed by millions of citizens every day as they exercise what they believe to be their free speech rights. This is an extraordinary encroachment on the freedoms of the press and of expression. Dozens of publishers and advertisers every year print millions of copies of the image of United States currency without meeting the safe harbor provisions of 18 U.S.C. § 504. Under the lower courts' interpretation of 18 U.S.C. § 474, the millions of individuals who possess these publications are all subject to felony prosecution on a strict-liability basis.

Possession of images of United States currency is scarcely exclusive to the nefarious world of the counterfeiter. The image of currency is commonplace. It is on the covers and pages of popular magazines, newspapers and books, in advertisements, and on billboards, coupons, and clothing. In an informal survey presented below, we found dozens of images of money published during one recent six-month period that did not satisfy the "safe harbor" of 18 U.S.C. § 504—in magazines with total circulation of more than 86 million. *See* App. 51a-55a. This informal survey did not cover every published magazine, but only a few popular ones. According to the lower courts, the creators and the "users" of these images are all committing felonies punishable by up to twelve years in federal prison. Under their interpretation of the statutes, every single subscriber or reader of these magazines is subject to strict-liability felony prosecution. Extrapolated over the general five-year statute of limitations period (18 U.S.C. § 3282), this is the equivalent of a three-count indictment for every man, woman and child in America.

According to this interpretation of the statute, the editorial, publishing, and printing staffs of most of our nation's large print-media news organizations are similarly subject to multi-ple-count indictments for violation of this strict-liability felony. Indeed, the recent publicity campaign surrounding the redesign of the currency occasioned "violations" on the front pages of leading newspapers across the country. *See infra* p. 16 & n.13.

The lower courts have therefore "criminaliz[ed] a broad range of apparently innocent conduct," *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), and their interpretation of the statute does not comport with "settled expectations that the contents of magazines and film are generally [not] subject to stringent regulation." *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 468-69 (1994). Indeed, the lower courts' decisions run directly afoul of this Court's repeated holdings that strict liability and the First Amendment do not mix. *See X-Citement Video, Inc.*, 115 S. Ct. at 472 ("'criminal responsibility may not be imposed without some element of scienter on the part of the defendant'") (quoting *New York* v. *Ferber*, 458 U.S. 747, 765 (1982)); *Smith* v. *California*, 361 U.S. 147, 151 (1959) (strict-liability criminal statutes "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual more reluctant to exercise it"); *see also New York Times Co.* v. *Sullivan*, 376 U.S. 254, 278-80 (1964) (following *Smith* to impose requirement of "actual malice" on libel plaintiffs); *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 52 (1988) ("a rule that would impose strict liability on a publisher for [unprotected expression] would have an undoubted 'chilling effect' on speech").

Of course, the damage done to the First Amendment by the decisions below is not that the Government actually *would* indict every man, woman and child in America, but that it has been given *carte blanche* to prosecute almost anyone under this statute, and that it apparently feels free to pick and choose whomever it would like to harass under the statute's auspices. The lower courts have given their imprimatur to this behavior, in a way that directly conflicts with the decisions of this Court and in a way that places millions of persons at risk of prosecution or, worse, *ex parte* gov-

ernment harassment for "violation" of the statute. We respectfully submit that this Court's attention is therefore warranted.

II. THE OPINIONS BELOW IGNORE FUNDAMENTAL RULES OF STATUTORY INTERPRETATION

As the Solicitor General explained in *United States* v. *X-Citement Video Inc.*, 115 S. Ct. 464 (1994), in order to prevail on an argument that a criminal statute affecting rights of free expression is a strict-liability statute, a litigant

> must demonstrate that Congress's intent not to require scienter is so clear as to overcome both the "background assumption of our criminal law," that scienter is required, *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), and the principle that the federal courts will "construe [a] statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[4]

This Court agreed. 115 S. Ct. at 467-68. Neither the Government nor the lower courts offered any reason why this case does not fall within the principles articulated in *X-Citement*. We submit that because the statute at issue affects so many millions of persons, this case is an even more compelling one for certiorari than *X-Citement* was.

The lower courts' interpretation of the statute is directly at odds with these two well-settled non-constitutional principles of statutory interpretation. *First*, conviction of a felony ordinarily requires a criminal state of mind. Justice Jackson's eloquent and enduring expression of this principle for the Court in *Morissette* v. *United States*, 342 U.S. 246 (1952), remains the touchstone for the rule requiring some "affirmative instruction from Congress to

---

[4]Reply Brief for the United States at 1, *United States* v. *X-Citement Video, Inc.*, 115 U.S. 464 (1994).

eliminate intent from any offense." 342 U.S. at 273. Again and again, this rule "has been 'followed in regard to statutory crimes even where the statutory definition did not in terms include it [the requirement of intent].'" *Staples* v. *United States*, 114 S. Ct. 1793, 1797 (1994) (quoting *United States* v. *Balint*, 258 U.S. 250, 251-52 (1922)). Yet here, the lower courts held that the statute is a strict-liability felony because Congress "knew how" to include a *scienter* element expressly. App. 2a, 38a.

To be sure, some "affirmative expression" from Congress to the contrary might override the *Morissette* presumption (though constitutional constraints would then be encountered). But here the statutory text contains no such expression. And the legislative history reveals an assumption on the part of Congress that the principles governing the law of counterfeiting (which included an intent-to-defraud requirement) would most certainly apply.[5] The legislative history reveals:

- The provision was proposed by Treasury Secretary Salmon P. Chase "to guard against counterfeiting" and because he was "[t]hinking of the danger of counterfeits."[6]

- The only recorded statements on the floor of Congress were those of the bill's chief sponsors that the provision would "guard against counterfeiting."[7]

---

[5]The statute was first enacted as Ch. 33, § 7, 37th Cong., 2d Sess., 12 Stat. 345, 347-48 (Feb. 25, 1862).

[6]Letter from S.P. Chase to Thaddeus Stevens (Feb. 3, 1862); Elbridge G. Spaulding, *History of the Legal Tender Paper Money Issued During the Great Rebellion* 26 (1869).

[7]Spaulding, *supra* at 98; John Sherman, *Recollections of Forty Years in the House, Senate and Cabinet* 290, 298 (vol. I, 1895).

— The very same Congress that enacted the provision stated in a later statute that its purpose was "to prevent and punish counterfeiting and fraud[]."[8] And,

— The law-enforcement officers charged with administering the provision in the era of its passage expressed the view that its purpose was "to suppress the counterfeiting of the paper money of the United States."[9]

Second, a statute must be construed, where fairly possible, to avoid potential constitutional problems unless "such construction is plainly contrary to the intent of Congress."[10] The lower courts did not even acknowledge this principle. But it applies with particular force to statutes that raise First Amendment concerns, where this Court has taught that statutes *must* be interpreted to avoid questions as to their constitutionality. *See, e.g., United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 467-68 (1994) (rejecting "most natural grammatical reading" of statute); *Frisby* v. *Schultz*, 487 U.S. 474, 483, 492 n.3 (1988) (adopting "rather strained" reading of statute); *Cantwell* v. *Connecticut*, 310 U.S. 296, 311 (1940). This case follows *a fortiori* from those, because other rules of statutory construction also require an interpretation of the statute as containing a scienter element.

---

[8]Ch. 73, § 8, 37th Cong., 3d Sess., 12 Stat. 709, 713 (March 3, 1863).

[9]Letter from Lot M. Morrill to John Sherman (Jan. 15, 1877) and Letter from George F. Talbot to Lot M. Morrill (Jan. 15, 1877) (both *printed in* Ex. Doc. No. 19, 44th Cong., 2d Sess. (Jan. 17, 1877)); Letter from John Sherman to W.A. Wheeler (Jan. 16, 1878) (*printed in* Ex. Doc. No. 10, 45th Cong., 2d Sess. (Jan. 17, 1878)).

[10]*Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see Public Citizen* v. *Department of Justice*, 491 U.S. 440, 465-66 (1989) (collecting cases).

III. THIS COURT'S ATTENTION TO 18 U.S.C. § 504 IS WARRANTED

Absent some narrowing, a blanket strict-liability prohibition on possession of images of United States currency would be flatly unconstitutional. The Government contends that sufficient narrowing was accomplished in 18 U.S.C. § 504. We submit that, in light of modern computer technology, section 504 is no longer adequate to the task. Section 504 is a "safe harbor" exemption from liability under any counterfeiting provision for illustrations that meet certain size and color limitations.[11] In 1984, this Court confronted a facial challenge to sections 474 and 504 in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984). That case produced four opinions, none garnering a majority. They fill 64 pages of the United States Reports. The four opinions assumed that section 474 was a blanket restriction and left the status of the facial constitutionality of the size and color rules unsettled. Four members of the Court were of the view that the rules were "reasonable manner regulations that can be constitutionally imposed on those wishing to publish photographic reproductions of currency." 468 U.S. at 658-59 (footnote omitted). Four other members of the Court would have struck the statute down in its entirety. 486 U.S. at 691, 692. Finally, Justice Stevens refused to opine on the facial validity of the statute at all, explaining "while the statute might not have accommodated adequately the First Amendment rights of all individuals, if it has successfully avoided abridging Time's freedom of speech or press through the exception, Time has no stake in championing the rights of third parties regarding these issues." 468 U.S. at 694.[12]

---

[11]The illustration must be less than 75% or more the 150% of the size of the genuine article and must be in black and white.

[12]Justice Stevens thus concurred in part and dissented in part: "The question for us, of course, is not whether Congress could have done a better job, but whether the job it did violates *Time's* right to free expression. It does not . . . . Accordingly, I concur in the judgment of the Court in part, and dissent in part." 468 U.S. at 704 (emphasis in original). Within the confines of that approach, of course, Time's complaint has little to do with that of Boggs, who asserts his own rights

Although application of the rules of statutory interpretation laid out above would avoid a finding of unconstitutionality, the record in this case establishes that changes in technology have eaten away at the underpinnings of the statutory scheme, so that it is no longer narrowly tailored to serve the Government's legitimate goal. A statute is not "narrowly tailored" if "a substantial portion of the burden on speech does not serve to advance the goals." *Simon & Schuster, Inc.* v. *New York State Crime Victims Bd.*, 502 U.S. 105, 122 n.** (1991).

The statute as interpreted below violates that rule by covering a wide variety of speech that bears no risk of promoting counterfeiting or fraud. At least 86 million copies of popular magazines containing apparent "violations" were published in one recent six-month period. App. 55a. If the lower courts' interpretation of the statute stands, all 86 million of these magazines—and millions and millions of others published before and after—are "contraband" and their possession is unlawful. Similarly, a recent publicity campaign surrounding the newly redesigned currency involved many "violations" of sections 474 and 504 (as interpreted by the lower courts) published on the front pages of our nation's newspapers.[13] The statute also has a very significant chilling effect:

---

as an artist to create obviously non-deceptive likenesses of the currency not falling within the narrow safe harbor. *See* App. 19a, 56a.

[13]*See, e.g.*, Charles R.T. Crumpley, "A New Look for Ben and Other Bills to Foil Counterfeiters," *Kansas City Star*, Sept. 28, 1995, p. A1 (color photo); John Schmeltzer, "We're In the Money; U.S. Launches Plan to Sell New $100 Bill," *Chicago Tribune*, Sept. 28, 1995, p. 1 (same); Ralph Varabedian, "Uneasy Money; U.S. Unveils $100 Note in Bid to Thwart Counterfeiters," *Los Angeles Times*, Sept. 28, 1995, p. D1 (same); "$100 Bill is Getting a Face Lift to Foil Cheats," *Greensboro News & Record*, Sept. 28, 1995, p. A1 (same); "$100 Bill's Face Lift Shown Off," *Houston Chronicle*, Sept. 28, 1995, p. 1 (same); "A More Current Currency," *Baltimore Sun*, Sept. 28, 1995, p. 1A (same); "Ben's $100 Bill Gets a Makeover," *Cincinnati Post*, Sept. 28, 1995, p. 1A (same); "Bigger Ben for $100 Bills," *Arizona Republic*, Sept. 28, 1995, p. A1 (same); "Cashing In: $100 Bill Remade," *St. Louis Post-Dispatch*, Sept. 28, 1995, p. 1A (same); Color Photo, *USA Today*, Sept. 28, 1995, p. 1A (same);

prudent lawyers will undoubtedly advise those clients who seek advice to steer well clear of any potential violation, because the penalties are simply too high. The statutory scheme therefore imposes a very substantial burden on legitimate speech.

At the same time, the statute no longer materially advances the Government's law-enforcement goals. In 1984, the plurality in *Time* deferred to the Government's assertion that negatives and four-color separations of images of currency were critical for the effective counterfeiter in the early 1980s and difficult to come by, so that allowing them to fall into the wrong hands could have had dangerous consequences. Therefore, four members of the Court opined that the size and color rules were facially valid, on the theory that they served the goal of making it "harder for counterfeiters to gain access to negatives that could easily be altered and used for counterfeiting purposes." *Time*, 468 U.S. at 657.

Today, alterations in size and color are no obstacle at all to the would-be counterfeiter: enlarging or reducing an image or changing its color takes only a few keystrokes on a computer. The Director of the Bureau of Engraving and Printing, which designs and produces United States currency, has testified before Congress that the difficulty of reproducing "color [is] an ineffective deterrent against today's high quality color copiers and computer scanners,"[14] and that new, narrowly tailored anti-counterfeiting measures "best respond to the threat" of counterfeiting.[15] The

---

"Countering Counterfeiters," *Louisville (KY) Courier Journal*, Sept. 28, 1995, p. 17 (same); "Hot Off the Press; Left-Of-Center Franklin May Thwart Counterfeiters," *New Orleans Times-Picayune*, Sept. 28, 1995, p. C1 (same); "New $100 Bill Intended to Flatter Franklin, Foil Fakers," *Atlanta Journal & Constitution*, Sept. 28, 1995, p. E1 (same).

[14] *Redesign of the Currency: Hearing Before the House Comm. on Banking*, 103d Cong., 2d Sess. 88 (July 13, 1994) (Prepared Statement of Peter H. Daly, Director, Bureau of Engraving and Printing).

[15] *U.S. Mint Authorization, The Bureau of Engraving & Printing & the U.S. Secret Service Counterfeit Division: Hearing Before the Subcomm. on Consumer Affairs & Coinage of the House Comm. on Banking,*

new measures have now resulted in a significant and highly publicized redesign of the currency.[16] Surely these new measures are compelling evidence that the size and color rules are no longer an effective means for accomplishing the goal of preventing counterfeiting. Remarkably, the Government presented *no* evidence to the lower courts justifying the size and color rules.

The statute thus burdens a substantial amount of legitimate speech, while only peripherally—if at all—advancing the Government's law-enforcement goals. Even statutes furthering *legitimate* government interests that intersect with First Amendment rights must be narrowly tailored.[17] This statute does not meet that test. It is a blunt instrument left over from a bygone era.

Congress itself has recognized that section 504 is no longer narrowly tailored to prevent counterfeiting and has therefore directed the Secretary of the Treasury to promulgate regulations that "permit color illustrations" and to "establish a system to ensure that the legitimate use of . . . electronic methods and retention of . . . reproductions [of currency] by businesses, hobbyists, press or others shall not be unduly restricted." Pub. L.

Finance & Urban Affairs, 102d Cong., 1st Sess. 47 (Apr. 23, 1991) (Prepared Statement of Peter H. Daly, Director, Bureau of Engraving and Printing).

[16]*See supra* p. 16 & n.13; *see generally* Robert E. Schafrik & Sara E. Church, "Protecting the Greenback," *Scientific American*, July 1995 at 40-46 (describing project to redesign currency).

[17]*See, e.g., United States* v. *NTEU*, 115 S. Ct. 1003, 1014-18 (1995) (striking down statute chilling speech of federal employees because government failed to show nexus between statute and government interest to be served); *Simon & Schuster, Inc.*, v. *New York State Crime Victims Bd.*, 502 U.S. 105, 122 n.** (1991) (striking down statute not narrowly tailored to promote admittedly "compelling" government interest); *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 636 (1980) (striking down ordinance that only "peripherally" promoted admittedly "substantial" government interest).

102-550, Title XV, § 1554, 106 Stat. 3672, 4071 (1992) (codified at 18 U.S.C. § 504(1)(D) & (2) (Supp. V 1993)).[18]

IV. THE D.C. CIRCUIT'S INTERPRETATION OF § 474 CONFLICTS WITH THAT OF OTHER CIRCUITS

The lower courts followed cases stating that section 474 is a strict-liability felony,[19] even though the Government conceded that those cases were in error. Brief for Appellees 38. Other courts, including the Fifth, Eighth, and Eleventh Circuits, have held that the statute requires an intent to engage in counterfeiting or a similar unlawful purpose.[20] The Seventh and Ninth Circuits

---

[18]Proposed regulations (*see* 60 Fed. Reg. 32929 (June 26, 1995)) would permit color illustrations only with quarter-inch "bold, black, block letters" reading "non-negotiable" and "prominently and conspicuously placed across the center portion." 60 Fed. Reg. at 32929-30. No regulations have been formally promulgated, and the propriety of those proposed is not before the Court.

[19]*United States* v. *Green*, 962 F.2d 938, 943 (9th Cir. 1992) ("proof of intent is not necessary"); *Koran* v. *United States*, 408 F.2d 1321, 1325 n.12 (5th Cir. 1969) (*dicta*) (following *Webb* v. *United States*, 216 F.2d 151, 152 (6th Cir. 1954) ("mere making of an impression . . . is a violation of the statute without proof of unlawful intent")); *Wagner* v. *Simon*, 412 F. Supp. 426, 430 (W.D. Mo. 1975) ("[p]laintiff's intent . . . is not a factor to be considered"); *Ex parte Holcomb*, 12 F. Cas. 328, 328 (C.C.D. Minn. 1871) ("intent, whether to use, or deceive, or defraud, has nothing to do with the crime").

[20]*United States* v. *Parr*, 716 F.2d 796, 808 (11th Cir. 1983) (defendant "intended to *use* the note to induce [an undercover agent] to purchase large quantities of [counterfeit] notes. Such intent to use for unlawful purposes clearly falls within the scope of 18 U.S.C. § 474."); *Britt* v. *United States*, 391 F.2d 540, 541-42 (5th Cir. 1968) ("requisite criminal intent" under section 474 is "intent to commit the offense of counterfeiting"); *Michener* v. *United States*, 157 F.2d 616, 620 (8th Cir. 1946) (under § 474, "possession would be innocent were it not possessed with intent to use . . . in counterfeiting"), *rev'd on other grounds*, 331 U.S. 789 (1947); *United States* v. *White*, 27 F. 200, 203 (C.C.E.D. Mo. 1886) (same for predecessor to 18 U.S.C. § 481, which parallels section 474 for

have suggested that a "knowing" state of mind is sufficient.[21] Although it did not acknowledge it, the D.C. Circuit has set itself in conflict with these courts. In addition, similar statutes whose text does not contain an intent element have long been held to require one anyway. The most familiar example is 18 U.S.C. § 495, which prohibits false making, alteration, forgery, and counterfeiting "for the purpose of obtaining" money from the United States in certain cases. The cases hold that conviction under any clause requires a *fraudulent* state of mind, even though only two of the three clauses expressly require an intent to defraud.[22] The D.C. Circuit's strict-liability standard is in conflict with these decisions, as well.

---

obligations of foreign governments); *see also United States* v. *Turner*, 586 F.2d 395, 399 (5th Cir. 1978) (upholding conviction where defendant "had the requisite criminal intent"); *Pawley* v. *United States*, 73 F.2d 907, 907 (9th Cir. 1934) (prosecution for violation of section 474's predecessor with intent to "use . . . in forging and counterfeiting"); *Litofsky* v. *United States*, 9 F.2d 877, 878 (2d Cir. 1925) (same); *United States* v. *Weber*, 210 F. 973, 975 (D. Wash. 1913) (same "with intent to use . . . and thereby defraud"); *United States* v. *Fitzgerald*, 91 F. 374, 375-76 (N.D. Wash. 1898) (jury acquitted after the court instructed that "[t]he intent must be a criminal intent," and "you must acquit the defendant, unless you find that he had the guilty intent that I have spoken of").

[21] *United States* v. *Kenney*, 5 F.3d 214 (7th Cir. 1993); *see also United States* v. *Green*, 962 F.2d 938, 943, 944 (9th Cir. 1992) (holding statute a strict-liability felony, but approving District Court's jury instruction requiring knowing state of mind).

[22] *See, e.g.*, *United States* v. *Hester*, 598 F.2d 247, 248 & n.4 (D.C. Cir. 1979); *United States* v. *Bates*, 468 F.2d 1252, 1255 (5th Cir. 1972); *United States* v. *Sonnenberg*, 158 F.2d 911, 915 (3d Cir. 1946); *Staton* v. *United States*, 88 F. 253, 255 (8th Cir. 1898); *see also United States* v. *Price*, 795 F.2d 61, 63 (10th Cir. 1986); *United States* v. *Massey*, 629 F.2d 1084, 1086 (5th Cir. Unit A 1980), *cert. denied*, 450 U.S. 969 (1981); *United States* v. *White*, 611 F.2d 531, 538 (5th Cir.), *cert. denied*, 446 U.S. 992 (1980); *United States* v. *Sullivan*, 406 F.2d 180, 186 (2d Cir. 1969).

The Court of Appeals made no effort to reconcile its decision with any of these cases. Its only explanation (App. 3a) for its holding was a one-line statement that interpreting section 474 as something other than a strict-liability felony would render it "duplicative" of 18 U.S.C. §§ 471 and 472. The Government did not make that argument, presumably because it recognized that section 471 prohibits counterfeiting, section 472 prohibits passing counterfeits, and section 474 is directed at the tools of the counterfeiter. Interpreting this last provision to carry with it an appropriate level of criminal intent would therefore not render the other provisions duplicative at all. Each is directed at different operative behavior. If the Court of Appeals were correct, then sections 471 and 472 *themselves* would be duplicative, and all counterfeiting prosecutions could proceed under section 474 without any proof of *scienter*. This would, of course, be a radical change in the law of counterfeiting.

* * * *

In sum, the decisions below place millions of persons in violation of a strict-liability felony in exercising their First Amendment rights, allowing the Government to pick and choose almost anyone to harass or prosecute. In this case, they chose Boggs for harassment; and the lower courts have held that they may. To reach that remarkable holding, the courts below had to ignore both the "background assumption of our criminal law" that *scienter* is required and the principle that the federal courts will construe a statute to avoid constitutional problems unless such construction is plainly contrary to the intent of Congress. Those courts also ignored fundamental changes to technology that have rendered the constitutional justification for the statute obsolete, and the D.C. Circuit has set itself in direct conflict with the rule in other circuits.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

KENT A. YALOWITZ
Counsel of Record

BRUCE R. KELLY
MARLA EISLAND
399 Park Avenue
New York, New York 10022
(212) 715-1000

Of Counsel:
ARNOLD & PORTER
Washington, D.C. and
New York, New York

DENNIS G. LYONS
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Attorneys for Petitioner,
J.S.G. Boggs

January 1996